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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN T. SHIMODA, *Administrator, Oahu Community Correctional Center*, and MICHAEL KAKESAKO, *Corrections Division Administrator*,

Petitioners,

v.

EMMET AKAO, ALLEN V. TRIPP, and GARRICK UMIAMAKA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

Our petition shows that the lower court's decision, which on the basis of "intervening" law permits litigation of damage claims charging that the Eighth Amendment is breached by any changes to prison population levels causing "increase in stress, tension, communicable diseases, and a high increase in confrontrations between inmates,"[1] is in conflict with the doctrine of objective qualified immunity (Pet. 13-16), the Eleventh Amendment (*id.* 17-18), and the intent of the consent decree settling the identical charges at issue here (*id.* 18-22).

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[1] Complaint ¶ 12, No. 83-1067 (D. Haw. Oct. 7, 1983), Pet. App. 19, *quoted*, 820 F.2d 302 (9th Cir. 1987), Pet. App. 2.

Respondents' opposition nowhere asserts that the recurring and substantial questions presented lack sufficient import to merit review. Indeed, it is precisely because, in respondents' words, this case is "unremarkable" (Resp. Br. 1), that review is warranted. Overcrowded prisons are not uncommon, and, if the reasoning below is permitted to stand, those who administer prisons across the Nation will be burdened with the threat of personal liability for any adverse "effect of overcrowding" (*id.* 5) whenever facilities they manage experience (usually due to factors beyond their control) a rise in inmate population.

It will be equally commonplace, if respondents prevail, that States, rather than enjoying the "jurisdictional" protection of the Eleventh Amendment, will be snarled in intensive fact-litigation over their liability in federal court, whenever a litigant asserts immunity is waived by "conduct" (*id.* 6).

Nor would it be surprising, if review is denied, if State officials' efforts to settle prison disputes through progressive devices such as the consent decree in *Spear v. Ariyoshi* come to a halt. When officials realize that, even if inmates consent to such measures as triple-celling, and waive claims for damages "applicable to more than the individual circumstances of a particular plaintiff class member," the case can be tried over as an "individual action concerning overcrowding" (Resp. Br. 8), settlement will most assuredly be considered an unrealistic option, and the lower federal courts, just as surely, will be burdened with additional litigation in this sensitive area.

None of these novel results, which themselves counsel review, can be drawn out of this Court's decisions. Indeed, respondents' own brief vividly dem-

onstrates that the claim that the decision below "does not directly or indirectly conflict with the decisions of this Court" (*id.* 3) is plainly wrong.

I. The Decision Below is in Plain Conflict With the Decisions of this Court under the Qualified Immunity Doctrine and the Eleventh Amendment.

Respondents argue review should be denied because "[t]he Ninth Circuit's decision did not hold, implicitly or explicitly, that the petitioners are not entitled to immunity," and, thus, there is no conflict with this Court's decisions. (Resp. Br. 3). In their view, until "petitioners' conduct [is] fleshed out in discovery," immunity claims are premature (*id.* 4).[2]

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[2] Respondents' claim that review should be denied because immunity was not presented to the court of appeals until "after the Ninth Circuit decided the appeal" (Resp. Br. 2) is wrong on many fronts. First, petitioners' claim based on *Anderson v. Creighton*, 107 S. Ct. 3044 (1987), was not even available when the case was decided, particularly given Judge Canby's opinion in *Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984), *rev'd on other grounds*, 475 U.S. 312 (1986). Second, petitioners, appellees below, are fully entitled to raise immunity here, since it was the obligation of the lower court, sitting in review of the judgment of the district court, to affirm "on any ground that finds support in the record." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *see also Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Third, in any case our argument on the merits more than subsumed a *Harlow* immunity claim, insofar as it was, and remains, our view that respondents' claimed rights have not ever been "clearly established," let alone at the time petitioners allegedly acted in this case; *see also* appellees' Additional Citations, No. 84-1538 (9th Cir. Jul. 16, 1985) (citing, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982))).

With respect to the Eleventh Amendment, see *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam).

With respect to claims against petitioners in their individual capacities, the premise of respondents' argument—that the panel decision does not deny us the benefits of immunity—is contrary to every qualified immunity decision of this Court since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified, no less than absolute immunity, assures "that officials can act without fear of harassing litigation," *Davis v. Scherer*, 468 U.S. 183, 195 (1984), and bars not only "money damages," but "such pretrial matters as discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This protection for "all but the plainly incompetent," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), requires that defendants be "entitled to dismissal prior to discovery" if "the actions [the defendants are] allege[d] to have taken are actions that a reasonable officer could have believed lawful." *Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987). In short, qualified immunity is an "entitlement not to have to answer for [one's] conduct in a civil damages action." *Mitchell*, 472 U.S. at 525 (citation omitted).

Although respondents suggest (Resp. Br. 5-6) that we have not been denied our rights under *Anderson* because, ostensibly, the case has simply been remanded so that respondents may "file an amendment" (Pet. App. 3), these claims are wholly illusory. It is established, both here, *see Foman v. Davis*, 371 U.S. 178, 182 (1963), and in the Ninth Circuit, *see Klamath Lake Pharmaceutical Assoc. v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1293 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983), that an amendment that would be futile under Rule 12 standards, *Conley v. Gibson*, 355 U.S. 41 (1957); *Estelle v. Gamble*, 429 U.S. 97 (1976), must be denied. Unless the panel de-

cision is error under *Foman* and *Klamath*, the panel's ruling that the district court's failure to grant amendment here was not only error, but plain error, necessarily implies petitioners may not prevail on immunity at the Rule 12 stage on remand. *Cf. United States v. Frady*, 456 U.S. 152, 163 n. 13 (1982) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). Respondents, who assert that the order below entitles them to discovery on the merits (Resp. Br. at 4, 5, 6), confess our immunity claim is ripe. *If* respondents allege facts implicating the panel's expansion of *Toussaint*'s "intervening" standards (*see* Pet. 16), that is, if respondents claim that overcrowding "engenders violence, tension, and psychiatric problems" (Pet. App. 2), and cure the technical Article III defects in their complaint by alleging that "they personally have suffered" (*id.* 2-3), respondents will survive a motion to dismiss, immunity notwithstanding.[3]

The law of the case established by the panel is thus in direct conflict with the teaching of *Anderson v. Creighton*, 107 S. Ct. 3034 (1987). The panel's *only* reason for remanding was "the intervening *Toussaint* opinion" (Pet. App. 2), yet, under *Anderson*, further litigation ought to have been barred because officer's liability under 42 U.S.C. § 1983 must be predicated upon an official's knowing violation of "current American law." 107 S. Ct. at 3042. Respondents' effort (Resp. Br. 5) to buttress the panel analysis with citations to *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), and *Spain v. Procunier*, 600 F.2d 189 (9th Cir.

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[3] Thus, "the harm [we seek] to avoid—[the burden of answering the claims]—will occur regardless of the result on remand." *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 997 (1987).

1979), as demonstrated already (Pet. 14-16), is identical to the reasoning rejected in *Anderson*. Broad dicta that a prison must provide " 'adequate food, clothing shelter, sanitation, medical care, and personal safety,' " *Hoptowit*, 682 F.2d at 1246, or that a "court's judgment must be informed by current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health," *Spain*, 600 F.2d at 200, say no more about what specific conditions violate the prohibition on cruel and unusual punishments than does the general right "to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" dictate that a search is "objectively legally unreasonable" simply because it breaches this "firmly established" rule. *Anderson*, 107 S. Ct. at 3039; *see also Mitchell*, 472 U.S. 530-35; *Davis*, 468 U.S. at 192 n.10.

When *Anderson* is applied faithfully, whether the "stress, tension, disease" and "confrontations" associated with multiple celling of inmates solely during sleeping hours in rooms with more than twenty-five square feet of floorspace per inmate implicated, at the time the complaint was filed, no "clearly established" law under the Eighth Amendment, even in the Ninth Circuit. *Hoptowit*, 682 F.2d at 1249 (out-of-cell time critical to Eighth Amendment inquiry); *Spain*, 600 F.2d at 200 (outdoor exercise required only if prisoners held in cells for all but one hour a day, five days a week, for more than four years). That is doubtless why the district judge in this very case dismissed respondents' claims on the merits (Pet. App. 7-9). Indeed, the conditions alleged here were quite arguably lawful under the "intervening *Tous-*

saint opinion." (Pet. App. 2; *see* Pet. 16). There is simply no way, properly applied, the qualified immunity doctrine would permit respondents to litigate their claims for damages against petitioners in their individual capacities. For this reason the writ should be granted. *See Anderson*, 107 S. Ct. at 3038-39; *Mitchell*, 472 U.S. at 535; *Davis*, 468 U.S. at 192 n.10; *see also Harlow*, 457 U.S. at 818 n.32.

Certiorari is even more warranted if, as respondents argue, the panel decision rests on the view that a claim that Hawaii has waived Eleventh Amendment immunity is amenable to discovery (Resp. Br. 6). Respondents' claim is refuted by the very case they cite, *Welch v. Department of Highways*, 107 S. Ct. 2941 (1987), which reaffirms that this Court "will find a waiver by the State 'only where stated "by the most express language or by such overwhelming implications from [a statutory] text as [will] leave no room for any other reasonable construction." ' " *Id.* at 2946 (plurality op.). Nowhere do *Welch* or the cases on which it relies suggest a consent decree, let alone one imposing only prospective relief, can ever be the basis of a waiver of the Eleventh Amendment for retroactive damage awards. *Cf. Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987) (Amendment may bar even prospective terms of consent decree).

The claim that the panel decision "does not directly or indirectly conflict with the decisions of this Court regarding the qualified immunity doctrine or the Eleventh Amendment" (Resp. Br. 3) is unfounded. The writ should be granted.

II. The Decision Below Holding the Decree in Spear v. Ariyoshi to be Without Any Effect on Damages Claims Merits Review.

The enduring irony of the panel decision is that the one issue on which a remand was in order—whether the parties' intent in settling claims "applicable to more than the individual circumstances of a particular class member" (Pet. App. 40) barred damages claims such as those here—was decided adversely to us as a matter of law, while the purely legal issues of officer's and Eleventh Amendment immunity were remanded for further review. Respondents' contentions in support of the panel's summary dismissal of the implications of *Spear v. Ariyoshi* prove that the only question that ought to have been "fleshed out in discovery" (Resp. Br. 4) is whether this case is moot.

Respondents' bold claim that the "waiver clause in the consent decree . . . is unambiguous" and that "[r]espondents did not waive *any* claims for monetary relief" (Resp. Br. 7) (emphasis added) reads significant parts of the clause out of the decree. The only claims expressly preserved by the clause are "*individual* claims for declaratory, injunctive, and/or monetary relief" (Pet. App. 40, quoted, Resp. Br. 7) not "all" claims for monetary relief. Contrary to respondents' representation (Resp. Br. 7-8), the second sentence of the waiver clause, which bars "claims for injunctive relief of a general nature as detailed in the complaint . . . and which are applicable to more than the individual circumstances of a particular plaintiff class member," *id.*, does not deal solely with "claims for injunctive relief." Indeed, the panel rejected respondents' view in holding that declaratory relief was also barred. *Cf. Colorado River Conserva-*

tion District v. United States, 424 U.S. 800, 816 (1976) (contrasting *Younger v. Harris*, 401 U.S. 37 (1971), with *Samuels v. Mackell*, 401 U.S. 66 (1971)). Thus, where, as here, inmates seek to litigate claims "applicable to more than the individual circumstances of a particular plaintiff class member," damages are barred and the inmate must resort to the decree's mediation remedies (Pet. App. 38). Indeed, nowhere do respondents offer any rejoinder to the claim that the consent decree is senseless if the very triple-celling to which respondents consented until December 15, 1987 (*see* Pet. i, 10) can be the basis of litigation and damages awards.

Although this Court properly may review the panel's failure correctly to effect a settlement of federal litigation involving numerous parties and matters of public concern, *e.g.*, *Nevada v. United States*, 463 U.S. 110 (1983), it is not necessary at this time that this Court deploy its resources to resolve finally the parties' dispute over the meaning of the consent decree. What we do ask, however, is that, given the plausibility of our position, the writ should be granted, the judgment vacated, and the case remanded to the district court for further consideration of whether the instant claims are moot. Such a disposition would effect the rules of summary process, *see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513-14 (1986); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948), and Article III, *see, e.g.*, *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); *Ellis v. Dyson*, 421 U.S. 426, 435 (1975), that have long governed when, during the course of an appeal, it becomes distinctly possible that "there no longer is a

live controversy." *Deakins v. Monoghan*, 108 S. Ct. 523, 538 (1988).

CONCLUSION

For the reasons above and those presented in the petition for certiorari, the writ should be granted.

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